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## CORPORATIONS UNDER THE BANKRUPTCY ACT OF 1898.

In its application to corporate bodies, the Act of Congress of July 1, 1898, establishing a uniform system of bankruptcy, differs in certain important features, both of policy and detail, from the previous national laws on the same subject. It is the purpose of the present article to indicate the more striking of these peculiarities of the new act, and to discuss their probable effect, in so far as that can be done in advance of authoritative rulings of the courts on the interpretation of the statute.

In the first place, corporations were allowed to take the benefit of the bankruptcy act of 1867 on their voluntary petition. Such petition might be filed on behalf of the corporation by "any officer of any such corporation or company duly authorized by a vote of a majority of the corporators at any legal meeting called for the purpose."\* It is not so under the present law. The fourth section of the act provides that "any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt." And in connection with this provision should be read the declaration of the introductory section that "'corporations' shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association." It is obvious that this definition permits the voluntary bankruptcy of ordinary commercial partner-

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\* Rev. St. U. S. §5122.

ships, but shuts out most forms of limited partnership, joint-stock companies, and other forms of associated capital.

As all corporations are excluded from the voluntary features of the act, so also many kinds of corporations are exempted from compulsory proceedings under it. Involuntary proceedings in bankruptcy may be taken against "any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over. Private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts."\* This provision is much more restricted than the corresponding clause of the act of 1867, which applied to all "moneyed, business, or commercial corporations." Under that clause it was said that a corporation carrying on and pursuing any lawful business, defined and clothed by its charter with power to do so, was a "business corporation" and amenable to the bankruptcy law; and that it was the clear intent of the clause to bring within the scope of the law all corporations, except those organized for religious, charitable, literary, educational, municipal, or political purposes.† Hence, for example, the authority of a court of bankruptcy to adjudicate a railroad company bankrupt and administer its property under the act was fully established and not infrequently exercised.‡ But such a corporation does not appear to fall under any of the classes enumerated in the new act, unless possibly it should be considered that its business was a "mercantile pursuit," and even that construction would do violence to the established use of language. To take another illustration, insurance companies were held to be subject to the compulsory features of the act of 1867, as they are clearly "moneyed or business" corporations.§ Insurance companies do not manufacture, print, or publish, as the principal part of their business; and it is very doubtful whether their business could be considered a "mercantile pursuit," within the true meaning and intent of the law. On this point the courts must eventually decide. There is but little direct authority. But we have a decision that insurance is not "commerce," as that term is used in the Constitution of the United States,|| and numerous rulings

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\* Bankruptcy Act, 1898, §4, b.

† *Alabama & C. R. Co. v. Jones*, 5 N. B. R. 97.

‡ See *New Orleans, S. F. & L. R. Co. v. Delamore*, 114 U. S. 501, and other cases cited in *Black, Bankruptcy*, 30.

§ *In re Merchants' Ins. Co.*, 3 Biss. 162.

|| *Paul v. Virginia*, 8 Wall. 168; *Insurance Co. of North America v. Commonwealth*, 87 Pa. St. 173.

(presently to be cited) to the effect that a "merchant" is one who buys and sells commodities. Religious societies, in the United States, are almost invariably corporations, and hence are not subject to the bankruptcy law. For, as corporations, they cannot take advantage of it by a voluntary petition, nor can they be proceeded against *in invitum*, since they are not engaged in "manufacturing, trading, printing, publishing, or mercantile pursuits." But it seems that an association of persons organized for religious or ecclesiastical purposes, but which has not complied with the statutes of the state with respect to the steps necessary to secure a corporate existence, might be proceeded against as an "unincorporated company," provided it did not have "any of the powers and privileges of private corporations not possessed by individuals or partnerships," and owed debts to the amount of a thousand dollars.

As to this phrase, "unincorporated company," there is need of careful discrimination. The fourth section of the act provides that "any natural person," except such as follow certain enumerated pursuits, "any unincorporated company, and any corporation engaged principally in manufacturing," etc., may be adjudged an involuntary bankrupt. The introductory section, as we have seen, makes the term "corporation" include "limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association." Now, if the word "corporation," in the clause relating to involuntary bankruptcy, is to be taken in this comprehensive sense, then, being contrasted with "unincorporated company," it will include, and "unincorporated company," will *not* include, limited partnerships and joint-stock associations. The effect of this reading will be that such partnerships and associations are not amenable to the law unless pursuing one of the enumerated occupations, while any other form of unincorporated company is subject to the law without reference to the nature of its business.\*

Aside from printing and publishing companies, those corporations which are made subject to the compulsory provisions of the act are, as already stated, corporations engaged in "manufacturing, trading, or mercantile pursuits." The term "trader" is not new in bankruptcy law. In fact, at first, such laws were

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\* As to the nature of joint-stock companies and limited partnerships, with particular reference to the question of their corporate existence, and to their citizenship for purposes of Federal jurisdiction, see *Chapman v. Barney*, 129 U. S. 677; *Carnegie v. Hulbert*, 3 C. C. A. 391, 53 Fed. Rep. 10; *Youngstown Coke Co. v. Andrews Bros. Co.*, 79 Fed. Rep. 669.

restricted entirely to persons who answered to this description; and even after their scope was enlarged, traders were required to keep books of account, in order to be entitled to a discharge, and in some other respects were distinguished from others subject to the law. The interpretation of the term, therefore, as here used, should not occasion any special difficulty. The same is true, in a measure, of the terms "merchant" and "mercantile pursuits." But "manufacturer," as descriptive of a class of persons amenable to be proceeded against in bankruptcy, is an entirely novel designation. The courts, however, in putting a construction upon this word, will not be entirely without precedents to follow. In many of the states statutes have been enacted which make special provision for the organization and government of "manufacturing corporations," or impose special liabilities upon their directors or stockholders, or exempt, wholly or in part, their property from the ordinary burdens of taxation. Upon the simple question whether or not a given corporation comes within the class thus designated, decisions rendered under these state statutes should be considered applicable to the bankruptcy law, and while not binding on the federal courts, will be of value as persuasive authorities.

And first, a merchant is "one who is engaged in the business of buying commercial commodities and selling them again for the sake of profit; especially one who buys and sells in quantity or by wholesale. One who buys without selling again, or who sells without having bought, as where one sells products of his own labor, or who buys and sells exclusively articles not the subject of ordinary commerce, or who buys and sells commercial articles on salary and not for profit, is not usually termed a merchant."\* In the case of a merchant, as well as a manufacturer, there is the common element of purchasing personal property, with a view of making a gain or profit. But a manufacturer attains this object "by adding to the value of the property after purchase, by some process or combination with other materials, while the merchant is supposed to get his advanced price or profit by selling the article as it is, without subjecting it to any change by hand, by machinery, or by art. The material entering into the manufactured article may be modified more or less in its identity, as it passes through the several stages of a manufacturing process; but the merchant

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\*Century Dict. voc. "Merchant." A merchant is one who buys to sell again, and who does both, not occasionally or incidentally, but habitually and as a business. *Commonwealth v. Natural Gas Co.*, 32 Pittsb. Leg. J. 309; *State v. Smith*, 5 Humph. 393; *Lansdale v. Brashear*, 3 T. B. Mon. 330.

deals in the manufactured article itself, or its constituents, by buying and selling them in the same condition in which he purchases them. His business is that of exchanges and not of making or fabricating from raw materials."\*

Proceeding now to specify examples of these questions, we find decisions to the effect that the production of illuminating gas, and supplying it to consumers, is a manufacture, and that corporations organized for this purpose and engaged in this business are "manufacturing companies."† Not so, however, with natural gas. A company engaged in supplying natural gas to customers for light and heat is not a manufacturing corporation. Natural gas is "a product of nature, and not the result of any manufacturing process."‡ As to electric companies, the decisions are squarely opposed. In Pennsylvania and Maryland, it is held that a company generating electricity and selling it to customers for power, illuminating, or heating purposes, is not a manufacturing company, within the meaning of statutes exempting the capital stock of such companies from taxation. § In New York, on the other hand, it is as decidedly held that such a corporation *is* within the terms of a similar statute. || In Pennsylvania, again, a corporation engaged in supplying its tenants with steam power, to enable it the more readily to rent its buildings and rooms, is not a manufac-

\* *Engle v. Sohn*, 41 Ohio St. 691. As to this distinction, see further *People v. Roberts*, 90 Hun. 533, 36 N. Y. Supp. 73; *Eaton v. Walker*, 76 Mich. 579, 43 N. W. Rep. 638.

† *Nassau Gaslight Co. v. Brooklyn*, 89 N. Y. 409. But in Louisiana, it is ruled that capital employed in the making of illuminating gas for street lighting is not within the terms of a statute which exempts from taxation capital employed in the manufacture "of chemicals." *Shreveport Gas Co. v. Assessor*, 47 La. Ann. 65, 16 South. Rep. 650. And in Illinois gas companies are not considered as manufacturing companies, because the statutes plainly distinguish between them. *Ottawa Gaslight Co. v. Downey*, 127 Ill. 201, 20 N. E. Rep. 20.

‡ *Emerson v. Commonwealth*, 108 Pa. St. 111. And a company engaged in producing or collecting natural gas from its own wells, and selling and distributing the same to customers, is not a "mercantile" corporation; because, although it sells, it does not buy. *Commonwealth v. Natural Gas Co.*, 32 Pittsb. Leg. J. 309.

§ *Commonwealth v. Northern Electric Light and Power Co.*, 145 Pa. St. 105, 22 Atl. Rep. 839; *Commonwealth v. Edison Electric Light Co.*, 170 Pa. St. 231, 32 Atl. Rep. 419; *Frederick Electric L. & P. Co. v. Mayor of Frederick*, 84 Md. 599, 36 Atl. Rep. 362; *Commonwealth v. Brush Electric Light Co.*, 145 Pa. St. 147, 22 Atl. Rep. 844.

|| *People v. Wemple*, 129 N. Y. 543, 29 N. E. Rep. 808; *People v. Campbell*, 88 Hun. 527.

turer.\* On the same principle which was held to determine the case of natural gas, it has been ruled that hay is not a "manufactured article."† As to natural ice, there is again a difference of judicial opinion. It was very sensibly said by the Supreme Judicial Court of Massachusetts: "The cutting of ice produced by the agencies of nature, on the surface of a pond, into pieces of a size convenient for handling, and storing the pieces in a building, cannot in any proper sense be called a manufacture. The material is in no way changed or adapted to any new or different use; it still remains ice, to be used simply as ice; it is no more a manufacture than putting the water from the pond into casks for transportation and use would be a manufacture."‡ And a similar conclusion has been reached by the courts in New York.§ On the other hand, in Michigan, it is ruled that the business of cutting natural ice from a river or lake and preparing it for use as an article of consumption, by clearing it from snow and reducing it to blocks of a convenient size, is manufacturing.|| However this may be, it is clear that the production of artificial ice by frigorific processes, as an article of commerce, is within the description of "manufacturing."¶ And a corporation dealing in natural ice, though it may escape liability to the bankruptcy law on the ground that its business is not manufacturing, is certainly a "merchant," and therefore subject to the law on that ground.\*\* In this connection it may be mentioned that an aqueduct company is not a "manufacturing" corporation, although it purifies the water before distributing it, by means of filters and screens.†† The business of slaughtering cattle and refrigerating the carcasses and shipping them to points for sale is not manufacturing;‡‡ though it seems that a company which buys and slaughters hogs, and subjects them to certain processes and combinations with other materials, requiring the application of skill, labor and capital, and converts them into lard and cured meats, for the purpose

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\* *Commonwealth v. Arrott Steam-Power Mills Co.*, 145 Pa. St. 69, 22 Atl. Rep. 243.

† *Frazee v. Moffitt*, 20 Blatchf. 267, 18 Fed. Rep. 584.

‡ *Hittinger v. Westford*, 135 Mass. 258.

§ *People v. Knickerbocker Ice Co.*, 99 N. Y. 181.

|| *Attorney-General v. Lorman*, 59 Mich. 157.

¶ *People v. Knickerbocker Ice Co.*, 99 N. Y. 181. Compare *Greenville Ice Co. v. Greenville*, 69 Miss. 86.

\*\* *Kansas City v. Vindquest*, 36 Mo. App. 584.

†† *Dudley v. Jamaica Pond Aqueduct Corp.*, 100 Mass. 183.

‡‡ *People v. Roberts*, 155 N. Y. 408, 50 N. E. Rep. 53.

of adding to the value thereof, with a view of making gain or profit, is engaged in "manufacturing."\*

The processes of extracting coal or mineral ores from the earth, and of smelting, reducing, and refining such ores, or breaking up and grading the coal, and of extracting slate or other stone from quarries, are not processes of manufacture; companies engaged in this business are mining companies, not manufacturing corporations.† But it appears that a corporation owning a quarry from which it takes slate and works it up into sizes and shapes desired, may be so far considered a manufacturing company as to be able to claim exemption from taxation on that part of its capital which is engaged in this part of its business.‡ And working fire clay into fire brick, tiles, and such other articles as are usually made of it, is manufacturing.§ So also is the business of "refining and preparing for use oil, coal, and other minerals."|| The business of converting trees and logs into marketable lumber, in a sawmill, is not manufacturing;¶ though it seems that a corporation whose business is the production of kindling-wood from slabs, by the use of machinery, skill, capital and labor, which article is different in form and condition from the material out of which it is made, being specially prepared for use as a kindler for anthracite coal, and known under a distinctive name, is engaged in the business of "manufacturing," within the meaning of the revenue law.\*\* On the other hand, in Louisiana, it is held that a planing-mill, engaged in dressing rough lumber into plain and tongued and grooved weatherboarding, flooring, and ceiling, and also in making mouldings, door and window casings, baseboards, and wainscoting, is not a manufacturing concern entitled to exemption from taxation.†† But a corporation which buys lumber,

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\* *Engle v. Sohn*, 41 Ohio St. 691. And a pork-packer is a "merchant;" and it is immaterial that his labor changed the form of the goods sold. *State v. Whittaker*, 33 Mo. 457; *In re Bassett*, 8 Fed. Rep. 266.

† *Horn Silver Min. Co. v. New York*, 143 U. S. 305; *Commonwealth v. Lackawanna Iron Co.*, 129 Pa. St. 346; *People v. Horn Silver Min. Co.*, 105 N. Y. 76; *Byers v. Franklin Coal Co.*, 106 Mass. 131.

‡ *Commonwealth v. East Bangor Slate Co.*, 162 Pa. St. 599, 19 Atl. Rep. 706.

§ *Commonwealth v. Savage Fire Brick Co.*, 157 Pa. St. 512, 27 Atl. Rep. 374.

|| *Hawes v. Anglo-Saxon Petroleum Co.*, 101 Mass. 385.

¶ *Jones v. Raines*, 35 La. Ann. 996.

\*\* *People v. Roberts*, 20 App. Div. (N. Y.) 514. Compare *Correio v. Lynch*, 65 Cal. 273.

†† *Whited v. Bledsoe*, 49 La. Ann. 325, 21 South. Rep. 538.

iron, and other materials in the rough, and at its own shops finishes, shapes, designs, and makes such materials suitable for use, and puts the same together in the erection of bridges, roofs, and other structures, is a manufacturing corporation.\* So also is a company operating a steam flouring-mill,† but not a grain-elevator company, engaged in buying, selling, and storing grain, building and operating grain warehouses, and incidentally dealing in coal, lime, and cement.‡ A book-binder who also makes blank books is (in Connecticut) a manufacturer,§ but not (in Louisiana) one who prints bill-heads, orders, and other forms for commercial purposes, on paper bought by him, and who cuts and folds the paper into shapes for such purposes, as well as to serve for ledgers and other commercial books.¶ A corporation engaged in mixing teas, and in roasting, grinding and mixing coffee, is not a manufacturing corporation.¶ Nor is the making of soda, vichy, seltzer, and similar drinks, a "manufacture of chemicals," within a statute granting exemption from taxation.\*\* But the building and construction of locomotive engines is manufacturing, and not the less so because a portion of the materials used in the construction of the engines are bought by the manufacturers in such a state of progress as to be adapted to the purpose designed with less labor than the raw material would require.††

As to the commission of acts of bankruptcy, upon which involuntary proceedings may be founded, the law makes no distinction between corporations and natural persons. Each of the five acts of bankruptcy enumerated in the statute can be as well committed by a corporate body as by an individual. Although the present statute gives the debtor much greater latitude in managing his affairs than was accorded by previous laws, and greatly restricts the number and character of the causes for which he may be thrown into bankruptcy, it is not within our present purpose to discuss these differences, as they do not peculiarly affect corporations. It should be remarked, however, that in every case actual insolvency at the time of

\* *Commonwealth v. Keystone Bridge Co.*, 156 Pa. St. 500, 27 Atl. Rep. 1.

† *Carlin v. Western Assur. Co.*, 57 Md. 515.

‡ *Mohr v. Minnesota Elevator Co.*, 40 Minn. 343.

§ *Seeley v. Gwillim*, 40 Conn. 106.

¶ *Patterson v. New Orleans*, 47 La. Ann. 275, 16 South. Rep. 815.

¶ *People v. Roberts*, 145 N. Y. 375, 40 N. E. Rep. 7.

\*\* *Crescent City Seltz & M. W. Co. v. New Orleans*, 48 La. Ann. 768, 19 South. Rep. 943.

†† *Norris v. Commonwealth*, 27 Pa. St. 494.

filing the petition is an essential. An insolvency does not now, as under former statutes, mean "inability to pay debts and meet engagements as they mature in the ordinary course of business." Congress has given an official definition to this term in the following words: "A person shall be deemed insolvent, within the provisions of this act, whenever the aggregate of his property exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." Moreover, the petition must be filed within four months after the commission of the act of bankruptcy.\* One who is insolvent, it is said, and who undertakes to make a final distribution of his assets, must do it through the court of bankruptcy. A trust to sell all the debtor's property and divide the proceeds ratably among his creditors is an act of bankruptcy. But a mortgage by a railroad company to secure all its creditors equally out of its earnings, and to pay such as refuse the security their ratable proportion of the proceeds, is not an act of bankruptcy.† Where a petition in bankruptcy is filed against a corporation, it is not necessary, in order to authorize counsel to appear and admit the acts of bankruptcy charged, that the incorporators or shareholders should previously, by a vote, authorize that act or direct it to be done.‡

In regard to the jurisdiction of the courts of bankruptcy over the person of the debtor, the terms of the act are very broad. They have authority to pass an adjudication in bankruptcy against persons (including corporations) "who have had their principal place of business, resided, or had their domicile, within their respective territorial jurisdictions for the preceding six months or the greater portion thereof."§ The residence or domicile of a corporation, it is now reasonably well settled, can be only in the state from which it derives its charter or under whose laws it was organized. But it will be perceived that the terms of the law are wide enough to cover the case of a corporation organized in one state but transacting all its business in another. Jurisdiction in bankruptcy over such a company would belong to the federal district court in the district where its principal office was maintained and the principal

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\* Bankruptcy Act, 1898, §3; Id. §1, clause 15.

† *In re Union Pac. R. Co.*, 10 N. B. R. 178.

‡ *Leiter v. Payson*, 9 N. B. R. 205.

§ Bankruptcy Act, 1898, §2, clause 1.

volume of its business transacted (for the preceding six months), without reference to the question of its "citizenship" in the same or another state. Where the same corporation enjoys a corporate existence by legislative recognition in two or more states at once, and successive petitions in bankruptcy are filed against it in the federal courts within each of those states, that court which first acquires jurisdiction, by the filing of a petition, will retain it, and must be permitted to exercise it to the fullest extent, without interference by any other court.\*

It is also important to be noticed, in this relation, that a corporation, subject to the provisions of the act, which has committed an act of bankruptcy, and is in existence when the petition against it is filed, and when the proper papers are served on its officers, cannot oust the jurisdiction of the bankruptcy court to proceed at the proper time to an adjudication, because a decree dissolving the corporation has been made after such service and before the return day.† And it is even held that the federal court has power to declare a corporation bankrupt notwithstanding its dissolution by decree of a state court before the institution of proceedings in bankruptcy, provided that such proceedings are commenced within six months (now four) after such dissolution, that being the time within which an act of bankruptcy must be alleged.‡

But supposing the corporation to remain in existence until it passes under the control of a court of bankruptcy, the interesting question arises whether or not it is *dissolved* by the adjudication in bankruptcy. On this point the authorities are not in harmony. On the one hand, it has been said that a corporation, for all essential purposes, is as effectually dissolved by the commencement of proceedings in bankruptcy as if a solemn judgment were pronounced to that effect. It is such a dissolution, it is said, as will afford creditors a remedy against the individual shareholders where they are made liable upon the "dissolution" of the company.§ And a federal court has declared that, under a state statute providing that upon the "dissolution" of a corporation its president and direct-

\* In re Boston, H. & E. R. Co., 9 Blatchf. 101.

† Platt v. Archer, 9 Blatchf. 559.

‡ In re New Amsterdam Ins. Co., 6 Bened. 368; In re Independent Ins. Co., 6 N. B. R. 260; Thornhill v. Bank of Louisiana, 1 Woods 1.

§ State Savings Ass'n v. Kellogg, 52 Mo. 583. And see Slee v. Bloom, 19 Johns. 456; Penniman v. Briggs, Hopk. (N. Y.) Ch. 300; In re Washington Marine Ins. Co., 2 Bened. 292.

ors or managers shall be in law trustees for the settlement of its affairs and personally responsible to creditors to the extent of the property which may come to their hands, the mere *insolvency* of the concern, known to the president and directors, works a practical dissolution, so as to impose upon them the statutory consequences.\* But there is strong authority the other way. The adjudication in bankruptcy, it is argued, does not necessarily destroy the life of the corporation any more than that of a natural person. It is true the bankrupt, while under the control of the court, is said to be *civilliter mortuus*; and of course all corporate functions, or at least all control of the business of the corporation, must be regarded as suspended during the continuance of the proceedings in bankruptcy. But there is nothing in the language of the act, nor in the necessary consequences of such a proceeding, to prevent the corporation from resuming its business and the exercise of all its corporate functions, after it shall have obtained a discharge; and so long as that is possible, it cannot with any propriety be said that the company is dissolved.† This view has been picturesquely expressed by the court in Georgia in the following terms: "The bankruptcy of a corporation does not put an end to its corporate existence nor vacate the office of its directors. A corporation of this state cannot be dissolved by an Act of Congress, nor by the administration thereof through the federal courts. Georgia created, and she alone can destroy. Besides, it is not the purpose of the bankrupt law to dissolve corporations. The assets are seized, but the franchise is spared. 'Your money,' not 'your life,' is the demand made by the bankrupt act."‡ The same view has been maintained by eminent courts in considering the effect of proceedings under the state insolvency laws upon the existence of corporations. "There is nothing in the proceedings to prevent their continuing to accomplish the end and purpose of their existence, at least until their franchise, or the right to act as a corporation, is sold under one of the provisions of the statute, if indeed such sale would have the effect. The corporation notwithstanding the proceedings in insolvency, may have assets sufficient to pay all their debts, and then no impediment

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\* *Sprague-Brimmer Manufacturing Co. v. Murphy Furnishing Goods Co.*, 26 Fed. Rep. 572.

† *Morley v. Thayer*, 3 Fed. Rep. 737.

‡ *Holland v. Heyman*, 60 Ga. 174. And see *Chamberlin v. Hugenot Manufacturing Co.*, 118 Mass. 532; *Shenandoah Valley R. Co. v. Griffith*, 76 Va. 913; 2 *Morawetz, Corps.* §1010.

would exist, before a surrender pursuant to law or a forfeiture ascertained and declared by a proper judicial proceeding, from resuming their business. Or if their capital is impaired or wholly gone, this seems to be no reason, before such surrender or forfeiture, to prevent the members from furnishing renewed capital and then proceeding to use their corporate powers."\*

As to the administration of the estate in bankruptcy, there are but few particulars in which proceedings against a corporation differ from those against a natural person. It is held, however, that the trustee in bankruptcy has all the authority of a receiver to collect demands and pay debts, and, under the order of the court appointing him, an assessment may be made on the unpaid shares of stock in the bankruptcy corporation, just as if the same had been ordered by the corporation itself before bankruptcy.† Moreover, the bankruptcy of a corporation does not prevent judgment being obtained against the corporation (unless the court of bankruptcy should see fit, for sufficient reasons, to enjoin the prosecution of the action); and the creditor, in default of obtaining satisfaction under the judgment from the property of the corporation, may pursue his statutory remedy against the stockholder.‡ But a stockholder indebted to the bankrupt corporation for unpaid shares cannot set off against this debt (which is a trust fund for creditors) a debt due him by the corporation. The fund arising from such unpaid shares must be equally divided among all the creditors.§

Is the franchise by which a corporation exists property which will vest in its trustee in bankruptcy, and which may be sold by him in the administration of his trust? It appears that the act of 1867 contemplated an affirmative answer to this question. For No. XXI of the General Orders framed under that act provided that, "In making sale of the franchise of a corporation, it may be offered in fractional parts or in certain numbers of shares corresponding to the number of shares in the bankrupt corporation." There is no such provision in the present statute nor in the new General Orders. But it is enacted that the trustee in bankruptcy shall be vested, by operation of law, with the title of the bankrupt to "property which, prior to the filing of the petition, he could by any

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\* *Coburn v. Boston Papier Mache Manufacturing Co.*, 10 Gray 243; *Boston Glass Manufactory v. Langdon*, 24 Pick. 49.

† *Upton v. Hansbrough*, 3 Biss. 417; *Myers v. Seeley*, 10 N. B. R. 411; *Sanger v. Upton*, 91 U. S. 56; *Payson v. Stoevers*, 2 Dill. 427.

‡ *Allen v. Ward*, 10 N. B. R. 285.

§ *Sawyer v. Hoag*, 17 Wall. 610.

means have transferred or which might have been levied upon and sold under judicial process against him." And "transfer," according to the definitions given in the first section of the law, "shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security." Now it is a general rule, settled by the preponderance of authority, that a corporation cannot mortgage, sell, or otherwise alienate its franchises, particularly the franchise of corporate existence, unless power to do so has been expressly conferred upon it; and consequently, that such franchises are not subject to levy and sale on execution to satisfy the debts of the corporation. But this rule will be found to have been established, and to be almost exclusively applied to the case of such corporations as have duties to fulfill, or services to render, towards the public, where the reason of it is very apparent. As to corporations of this kind, they are not subject to the operation of the present bankruptcy act; and as to corporations of other kinds, it is almost universally the case that their franchises, as such, have little or no pecuniary value. Where, however, such a corporation has authority to mortgage or sell its franchises, they would seem to come clearly within the description of property vesting in the trustee under the bankruptcy law.

The former bankruptcy law did not allow the granting of a discharge, under any circumstances, to a bankrupt corporation.\* And as a consequence of this, it was held that the provision of the statute for staying any pending suit or proceeding against the bankrupt, to await the determination of the court in bankruptcy on the question of discharge, did not apply to the case of a corporation,† and that the act of a creditor in proving his debt and recovering dividends and bankruptcy proceedings against a corporation was no bar to his recovering judgment for the balance in a state court.‡ But this appears to be changed by the present statute. It is enacted (§14) that "any person" who has been adjudged a bankrupt "may file an application for a discharge in the court of bankruptcy in which the proceedings are pending." And the first section of the law pro-

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\* "No allowance or discharge shall be granted to any corporation or joint-stock company, or to any person or officer or member thereof." Rev. St. U. S. §5122.

† *Meyer v. Aurora Insurance Co.*, 7 N. B. R. 191.

‡ *Ansonia Brass and Copper Co. v. New Lamp-Chimney Co.*, 53 N. Y. 123, 10 N. B. R. 355.

vides that the word "person," as used in the act, "shall include corporations, except where otherwise specified." In the absence of any provision in the law, necessarily making the discharge of a corporation impossible or inconsistent with the act, the irresistible inference from the clauses quoted is that a corporation which has been thrown into bankruptcy may have its discharge on the same conditions, and attended with the same consequences, as in the case of any natural person.

H. CAMPBELL BLACK.

WASHINGTON, D. C.